

IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 297/20

HELD AT MBABANE In
the matter between:

THE KING

and

LUNGELO GOODMAN NGWENYA

Neutral Citation: The King vs Lungelo Goodman Ngwenya (297/20) [2021] SZHC
182 (08/10,2021)

Coram: J.M. MAVUSO J,

Heard: 2nd September, 2021

Delivered : . 8th October, 2021

SUMMARY: Accused is charge with the offence of murder — At the time of commission of the offence, he is alleged to have been 16 years of age — When the charge was put to him, he pleaded guilty to the lesser offence of culpable homicide — The Crown accepted his plea — Thereafter statement

of agreed facts submitted — Accused found guilty on own plea — Sentenced to (6) six years imprisonment without option of a fine Sentence backdated to date of arrest and detention.

JUDGMENT

[1]The Accused a 16 year old juvenile was arraigned before Court on suspicion that he had murdered his father, one Felix Ngwenya.

[2] When the charge of murder was put to him, he pleaded guilty to the lesser offence of culpable homicide. The specific charge put to the accused is that:

"Upon or about 9th January 2017 and at or near Matsetsa area in the Lubombo Region he did wrongfully stab one Felix Ngwenya to death numerous times with a knife on the upper body and hit him

once with a crow bar on the head and did (sic) thereby commit the said offence"

[3] Having pleaded guilty to the lesser crime of culpable homicide, the crown proceeded to accept his plea. After confirmation of the plea by his

attorney, the parties proceeded to file a statement of agreed facts. This was read in for the record.

[4] In terms of the agreed statement of facts the accused revealed that his father was beating him and actually tried to stab him with a knife, resulting on a cut being inflicted on his cheek. Accused advised the Court that he was able to wrestle the knife from the deceased's hand. He admitted that he was the one who inflicted the fatal injuries which eventually caused the demise of his father and that there was no novus actus interveniens between his unlawful act and the death of the deceased.

[5] The deceased's cries for help, attracted the attention of some neighbours to his homestead who later on called the police when he could not be accounted for and or located at his premises. When the police arrived, they took with them the accused, whom they rushed to hospital for medical attention.

[6] Whilst the police had taken accused to hospital, his step mother in the company of some neighbours entered the house and noticed blood stains which made them suspicious that something bad had happened inside the

house. When they entered the accused's father's bedroom, they found clothes scattered on the floor and two basins full of soil.

[7] At the passage way, they saw a small portion of the floor without tiles, partially dug up. They dug up the soil on the already tampered with floor only to have a human foot protrude, subsequently discovering that the foot was that of the accused person's father who had died and had his corpse buried in a shallow grave, inside his house.

[8] The knife and crow bar used in killing the deceased were handed in Court as exhibits used in the commission of the offence.

[9] As per his plea and the provision of Section 272 (I) of the Criminal Procedure and Evidence Act No. 67 of 1938, the Court proceeded to find the accused person guilty of culpable homicide.

[10] In mitigation the Court was informed that the accused was a first offender that he had pleaded guilty to the offence and had not sought to waste the Court's time. It was also submitted that at the date of commission of the offence he was 16 years old and that at the date of hearing of this matter, he had attained the age of 21. The Court was informed that he had been in custody since the 9th January 2017.

It was submitted that deceased was his biological father and his only parent as he had never seen nor met his mother since he was born. It was contended that the loss of his father will always haunt him, for the rest of his life. It was also submitted that he was a bright child at school who ought to be given a second chance in life as he had passed his o' level examination very well, whilst in custody.

[1 1] The Crown, in counter, submitted that the offence of which accused was convicted of was a serious one and that a deterrent sentence should be imposed to deter other would be offenders from committing similar offences in future.

[12] In passing sentence I shall consider the triad properly set out in *S vs Rabie* 1975 (4) SA 855 A by Holmes JA that:

"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances".

The learned Judge warned Judicial Officers not to approach punishment in a spirit of anger:

"Nor should they strive after severity, nor on the one hand, surrender to misplaced pity. While not flinching from firmness,

where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality"

[13] In imposing sentence this Court has a duty to consider both the child's legal responsibility as well as his moral culpability see *Sikhumbuzo Masinga vs Rex*. Supreme Court of eSwatini Criminal Case No. 09/2011 where it was stated that:

"Clearly, the more mature child-juvenile or the juvenile adult would bear a greater moral, or legal responsibility than a child of tender years. A Court dealing with a child offender who is unusually wicked or precocious will be justified in taking those factors into the account in fashioning an appropriate sentence within the prevailing statutory regime and sentencing norms"

[14] The Children Protection and Welfare Act, 2012 makes it clear that matters

of children in conflict with the law are triable in a Children's Court as designated by Section 132 (1) of the Children Protection and Welfare Act 2012, "the Act".

[15] According to Moore JA in *Sikhumbuzo Masinga* (Supra) at page 14 paragraph 14 of the judgement;

"The deciding factors in determining whether a juvenile is tried in a juvenile Court where the atmosphere and procedures, as well as the sentencing regime, are all designed to spare the juvenile the rigors of adult Courts, are the age of the juvenile, his antecedents if any, and most importantly, the gravity of the offence with which he is charged".

The learned Justice continued to state that:

"It is hardly surprising therefore that when a juvenile is accused of committing serious offences, such as murder, rape, and aggravated woundings or robberies, which by their very nature are reprehensible offences carrying long terms of imprisonment* in many cases without the option of a fine-that the juvenile is tried in the High Court where he is liable to imprisonment or even execution in some states upon conviction".

[16] In the Botswana Court case of *S vs Molaudi & others* 1988 BLR 214 the Court held that:

"Where however, the juvenile is tried in the High Court that Court can impose a sentence of imprisonment".

In interpreting Section 26 (1) of the Children Act enacted by the Lesotho Legislature which is similar to Section 156 (1) of the eSwatini Children Protection and Welfare Act 2012, the Court held that;

"If at the date of sentence the accused has attained the age of 18 years, it is within the Court's discretion to impose whatever sentence it deems appropriate in the circumstances. Put differently, the relevant age for consideration for the purposes of Section 26 (1) is the age on the date of sentence".

[17] At paragraph [1 5] of the Sikhumbuzo Masinga (Supra) judgement, Moore JA observed that M.C.B. Maphalala J, as he then was;

⁶ Was unquestionably correct when he sentenced the then adult appellant to the minimum term of imprisonment mandated by Law. In so doing; the Court noted that "he took into account the fact that the appellant was aged fifteen years- and thus a juvenile when he committed the offence and that, through no fault of his own, he had suffered the anxiety of having his case pending for several years. The judge's benign sentence of the statutory minimum of nine years imprisonment for the offences of rape with aggravating circumstances cannot be faulted".

[18] Turning to the present case, the accused has been convicted of culpable homicide and now the Court will proceed to address the issue of an appropriate sentence, one that will be commensurate with the offence, detent to would be offenders and befit the criminal; bYtaking into account the personal circumstances of the accused. This is otherwise known as the triad. Holmes JA in *S vs Rabie* 1975 (4) SA 855 A puts the principle of a triad in the following manner:

"Punishment should fit the criminal as well as the crime, be fair to society and be blended with mercy according to the circumstances".

[19] Unlike in the *Sikhumbuzo Masinga* (Supra) where the judge was guided by statute in imposing a statutory minimum sentence of 9 years for the offence of rape with aggravating circumstances the Court will herein, have to rely on the nature of the offence and the range of sentences which have been previously imposed for similar offences.

[20] In *Musa Kenneth Nzima vs Rex* Criminal Appeal No. 21 of 2007 at page 8, his Lordship Tebbutt JA stated as follows:

"There are obviously varying degrees of culpability in culpable homicide offences. This Court has recognised this and in

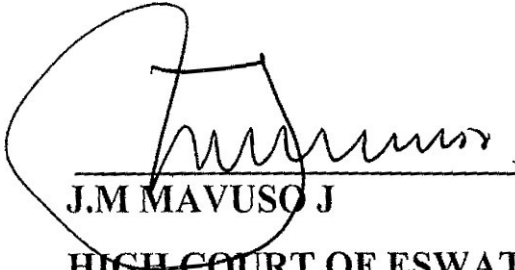
confirming a sentence of 10 years imprisonment in what it described as an extraordinarily serious case of culpable homicide, said that the sentence was proper for an offence at the most serious end of the scale of such a crime. A sentence of 9 years seems to me also to be warranted in culpable homicide convictions only at the most serious end of the scale of such crimes. It is certainly not one to be imposed in every such conviction".

[21] There is no doubt in my mind that the case before Court is a serious case of culpable homicide. The accused though a child, 16 years old, not only killed his father but proceeded to bury him in the family, house.

[22] Having taken into consideration the parties submission on mitigation including the fact of accused having sustained an injury on his cheek, in the hands of his father, the deceased. The Court does not lose sight of the fact that the relevant age for consideration for the purposes of sentence is the age on the date of sentence see *Sikhumbuzo Masinga* (supra). At the date of sentence, the accused has attained the age of 21 years

[23] With accused having attained the age of 21 years and taking into account the sentencing range in similar cases, the accused is accordingly sentenced to six

(6) years imprisonment, without the option of a fine. The sentence is backdated to the date of his arrest and detention.



J.M MAVUSO J
HIGH COURT OF ESWATINI

For DPP •

N.

MABILA

For Defence:

S. ZWANE